

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

STANLEY L. HOWARD,

Petitioner,

v.

No. 06-CV-341
(LEK/DRH)

HOWARD D. GRAHAM, Superintendent,
Auburn Correctional Facility,

Respondent.

APPEARANCES:

OF COUNSEL:

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**DAVID R. HOMER
U.S. MAGISTRATE JUDGE**

REPORT-RECOMMENDATION AND ORDER¹

Petitioner pro se Stanley L. Howard ("Howard") is an inmate in the custody of the New York State Department of Correctional Services ("DOCS"). After a bench trial in New York State Supreme Court, County of Cayuga, Howard was found guilty of (1) two counts of criminal possession of a controlled substance in the third degree, and (2) two counts of

¹ This matter was referred to the undersigned for report and recommendation pursuant to 28 U.S.C. § 636(b) and N.D.N.Y.L.R. 72.3(c).

criminal sale of a controlled substance in the third degree. He was sentenced to a total indeterminate term of seven and one-half to fifteen years imprisonment, which he is now serving. Howard petitioned this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on the grounds that he was (1) convicted by way of insufficient evidence and (2) denied the effective assistance of counsel. For the reasons which follow, it is recommended that Howard's petition be denied.

I. Background

Joshua Middleton and Roger Anthony ("Officers") were members of the City of Auburn Police Department and assigned to the Finger Lakes Drug Task Force (T. 12, 15, 40, 54, 93, 164-66).² On March 26, 2001, the Officers witnessed Howard driving down Genesee Street onto Hoffman Street in Auburn in a gold Chevrolet Impala sedan (T. 17-18, 41-44, 56, 64-66, 98, 170-72, 181, 188-90, 194-96, 217, 240). Howard picked up the Officers' confidential informant, Lynn Youtt ("Informant"), who had arranged the transaction in advance by telephone. Howard sold to her a quantity of crack cocaine in exchange for \$100 supplied to the Informant by the Officers (T. 13-19, 31, 103, 130-31, 171-73, 219, 253, 279). For evidentiary purposes, the Informant wore an electronic listening device to monitor the transaction (T. 14, 95-96, 215, 237-38). After the sale, the Officers debriefed the Informant and collected the rock cocaine and listening device (T. 26-27, 104, 131, 174, 220). Approximately twenty minutes after the first debriefing, the Officers monitored a second transaction between Howard and the Informant during which

²"T." connotes a citation to the trial transcript.

the Informant exchanged another \$100 for another quantity of crack cocaine (T. 26-29, 108-110, 222-23, 253, 277-80). Once more, the Officers debriefed the Informant and collected the cocaine and listening device (T. 29, 110, 135-36, 177, 196, 224). Howard was arrested.

Howard's first trial began on August 5, 2002 but ended in a mistrial due to the need for hearings on various issues (T. 32-39). The trial court held the hearings the next day and the trial recommenced (T. 84). On August 14, 2002, the trial court found Howard guilty on all counts (T. 275-280). The Appellate Division affirmed on February 4, 2005. People v. Howard, 788 N.Y.S.2d 909 (4th Dep't 2005). Howard sought leave to appeal to the New York Court of Appeals, but leave was denied on March 11, 2005. People v. Howard, 829 N.E.2d 680 (N.Y. 2005). This action followed.

II. Discussion³

A. Weight of the Evidence⁴

Howard argues in the second ground of his petition that the verdict rendered was against the weight of the evidence. This is not a cognizable claim in federal court.

³ Respondent argues that Howard did not exhaust his available state court remedies on direct appeal. Generally, a federal court will not consider a petition for a writ of habeas corpus unless the petitioner has first exhausted available state court remedies. 28 U.S.C. § 2254(b). However, the Anti-Terrorism and Effective Death Penalty Act (“AEDPA”) allows consideration of the petition on the merits notwithstanding a failure to exhaust. 28 U.S.C. § 2254(b)(2). In light of the disposition on the merits recommended herein, therefore, respondent’s exhaustion argument need not be addressed.

⁴The first ground of Howard’s petition appears to assert a claim that the evidence against him was inadmissible at trial because it resulted from an unlawful arrest and that the arrest was unlawful because there was insufficient evidence for his arrest. First, this contention appears to raise the same argument asserted in the second ground of the petition regarding the weight of the evidence and the discussion herein as to that ground applies equally to Howard’s contention regarding the lawfulness of his arrest. Second, as to any contention that Howard’s arrest lacked probable cause, that contention was resolved against Howard by the trial court and on his direct appeal. Howard may obtain habeas relief by showing that the state court’s decision was “contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court.” 28 U.S.C. § 2254(d)(1); *Carey v. Musladin*, 127 S. Ct. 649, 653 (2006); *Campbell v. Burgess*, 367 F. Supp. 2d 376, 380 (W.D.N.Y. 2004). “By ‘contrary to,’ the state court decision may be either contrary to Supreme Court precedent on a question of law or the state court decision is opposite to a relevant Supreme Court case with ‘materially indistinguishable’ facts.” *Johnson v. West*, No. 04-CV-751, 2007 WL 952058, at *2 (N.D.N.Y. Mar. 29, 2007)(quoting *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)). A state court unreasonably applies federal law when the state court correctly identifies the governing legal rule in a particular case but applies the rule to the facts in an “objectively unreasonable” manner. *Johnson*, 2007 WL 952058, at *2 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)). The state court’s determination of a factual issue is presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *DeBerry v. Portuondo*, 403 F.3d 57, 66 (2d Cir. 2005); *Boyette v. Lefevre*, 246 F.3d 76, 88 (2d Cir. 2001). The trial court’s ruling on the lawfulness of Howard’s arrest was neither contrary to nor involved an unreasonable application of clearly established federal law. For both reasons, therefore, Howard’s petition on this first ground should be denied.

Howard's contention that the verdict was against the weight of the evidence raises only a state law issue and not one recognized in this forum. See Parkinson v. Kelly, No. 01-CV-713 (TJM/GJB), 2006 WL 721645, at *19 (N.D.N.Y. Mar. 20, 2006) ("Insofar as petitioner raises a claim that the verdict was against the weight of the evidence, it must be dismissed as not cognizable in a federal habeas corpus application."). Thus, a court will generally dismiss such a claim. Id. However, because Howard proceeds here pro se, his claims are entitled to liberal construction. See Brown v. Duncan, No. 00-CV-290 (GLS/GHL), 2006 WL 1977469, at *13 (N.D.N.Y. July 11, 2006) ("[S]ince petitioner is proceeding pro se, his claims must be liberally construed.") (citations omitted). Liberally construed, Howard asserts in this claim that the verdict was not supported by legally sufficient evidence in violation of his federal constitutional right to due process of law. U.S. Const. amend. V, XIV.

However, liberal construction of a petitioner's arguments cannot cure substantive defects and certainly will not save a claim without merit. Absent a meritorious basis, a court must reject it. See Jenkins v. Unger, No. 03-CV-1172 (LEK/DRH), 2007 WL 911889, at *8 (N.D.N.Y. Mar. 22, 2007) ("The Court cannot grant habeas relief based upon unsubstantiated conclusions . . . or speculation.") (citing Wood v. Bartholomew, 516 U.S. 1, 8 (1995)). It is clear that a constitutionally sound argument will fail when it remains unsubstantiated. Id. at *3. Howard must support his claim with legitimate arguments to meet his burden.

The Supreme Court has "held that the Due Process Clause requires the State in criminal proceedings to prove guilt beyond a reasonable doubt." Cupp, 414 U.S. at 147 (citing In re Winship, 397 U.S. 358 (1970)). A defendant who claims that the evidence

was not sufficient to sustain such a conviction bears a very heavy burden. United States v. Pierce, 224 F.3d 158, 164 (2d Cir. 2000) Thus, Howard must overcome a highly deferential standard. Although a pro se petitioner's argument will be construed liberally, it is not true that the argument must also be interpreted to favor that party. See Parkinson, 2006 WL 721645, at *17. Rather, the opposite is true; a court reviewing the sufficiency of the evidence must draw all inferences in the prosecution's favor. Maldonado v. Scully, 86 F.3d 32, 35 (2d Cir. 1996). Further, the court will affirm a trial court's conviction if the "reviewing court finds that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Vazquez, 267 F.3d 79, 90 (2d Cir. 2001) (quoting United States v. Desimone, 119 F.3d 217, 223 (2d Cir. 1997) (emphasis added)); see also Jackson v. Virginia, 443 U.S. 307, 318 (1979).

In this case, the evidence admitted at trial would lead any rational trier of fact to conclude that the trial judge had sufficient ground to find Howard guilty beyond a reasonable doubt. Howard's actions violate state criminal statutes. Criminal possession of a controlled substance in the third degree is demonstrated if the accused "unlawfully possesses . . . a narcotic drug with intent to sell it." N.Y. Penal Law § 220.16 (McKinney 2007). Criminal sale of a controlled substance in the third degree is demonstrated if the accused "knowingly and unlawfully sells . . . a narcotic drug." N.Y. Penal Law § 220.39 (McKinney 2007). The record indicates that Howard intended to sell crack cocaine, a narcotic, by communicating with, and then driving to meet, the Informant. He then sold the crack cocaine to the Informant on two separate occasions during the same evening. Additionally, the Officers confirmed that the transactions took place via observation and

electronic monitoring. In light of this evidence, Howard cannot meet his heavy burden to demonstrate the insufficiency of the evidence as to any count of his conviction.

Accordingly, the petition on this ground should be denied.

B. Effective Assistance of Counsel

Howard argues as his third and final ground that he was denied the effective assistance of trial counsel.

A defendant arguing ineffective assistance of counsel must show that counsel was not functioning as constitutionally guaranteed by the Sixth Amendment. A party making such a claim must overcome the presumption against the claimant and in favor of counsel. United States v. DeJesus, 219 F.3d 117, 121 (2d Cir. 2000) (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)). He or she must establish that “counsel’s performance was deficient and that the deficiency caused actual prejudice to his defense,” and that the deficiency falls “outside the wide range of professionally competent assistance.” Id. This must be shown in a particularized way, “identify[ing] the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.” Strickland, 466 U.S. at 690. Petitioner bears the burden to prove that the errors of counsel were sufficiently severe “to deprive the defendant of a fair trial, a trial whose result is reliable.” Id. at 687.

Howard’s claim here is asserted in conclusory terms and fails to specify his trial counsel’s alleged errors. The Court must, therefore, refer to Howard’s brief on his state

direct appeal to ascertain the basis for this claim. This claim was denied on direct appeal and that denial was not contrary to nor an unreasonable application of clearly established law.

Considering those claims of deficient performance on their merits, moreover, no basis appears to support Howard's contention. In the appellate brief submitted to the Appellate Division by his appellate counsel, Howard asserted that his trial counsel failed to present witnesses to corroborate Howard's testimony that he was en route to or from New York City at the time of the drug transactions. In his pro se supplemental appellate brief, Howard further contended that his trial counsel was deficient in failing to interview prosecution witnesses before trial, subpoenaed Howard's records from DOCS which would have impeached the Informant's testimony that she had known Howard for one and one-half years, challenge a photographic identification, subpoena Howard's arrest photograph in another case to impeach the testimony of a police officer regarding Howard's hair style at the time of his arrest in this case, object to the prosecution's motion to amend the indictment to correct a street name, object to the admissibility of the tape recording of the drug sales because they were made without a warrant, move to dismiss the indictment on speedy trial grounds and as facially defective, and move to suppress certain evidence.

Howard has failed to meet either prong of the Strickland standard. First, he has failed to show that the performance of his trial counsel fell below constitutional standards in any regard. For example, there is no showing that witnesses existed to corroborate Howard's claim that he was traveling to or from New York City at the times in question.

More significantly, assuming the existence of any such witness, there is no showing to overcome the presumption that counsel determined that any such witness's testimony would do more harm than good to Howard's defense. Similarly, the other grounds offered by Howard in his pro se supplemental brief were either immaterial⁵ or a matter of trial strategy.⁶ Second, Howard has failed to demonstrate that the outcome of his trial would have been different if his trial counsel had taken the steps which contends he should have taken. Quite simply, the evidence of Howard's guilt was overwhelming. See subsection II(A) supra.

For both reasons, therefore, the petition on this ground should be denied.

III. Conclusion

For the reasons stated above, it is hereby

RECOMMENDED that the Howard's application for a writ of habeas corpus be **DENIED**.


Pursuant to 28 U.S.C. § 636(b)(1), the parties have ten days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of

⁵For example, how long the Informant had known Howard, Howard's hair style at any time, and the correct street name.

⁶For example, Howard's DOCS records and his arrest photograph from a prior arrest would have served to inform and remind the trial court of Howard's prior criminal record. Further, objection to a minor and insignificant amendment of the indictment was likely, and properly, viewed by counsel as pointless. As well, objection to the admissibility of the tape recording was likely viewed as pointless since no warrant was required in these circumstances where one party to the conversation, the Informant, consented to the recording.

the Court. **FAILURE TO OBJECT TO THIS REPORT WITHIN TEN DAYS WILL PRECLUDE APPELLATE REVIEW.** Roldan v. Racette, 984 F.2d 85 (2d Cir. 1993) (citing Small v. Sec'y of HHS, 892 F.2d 15 (2d Cir. 1989)); 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: December 14, 2007
Albany, New York



United States Magistrate Judge